Office - Supreme Court, U.S.
FILED
JUN 15 1982
ALEXANDER L. STEVAS,
CLERK

81-2309

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

LOUIE L. WAINWRIGHT,

Petitioner,

vs.

STEVEN HENRY ROBERTS,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
401 N.W. 2nd Avenue
(Suite 820)
Miami, Florida 33128
(305) 377-5441

QUESTION PRESENTED

WHETHER THE DECISION OF THE ELEVENTH JUDICIAL CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH CHAMBERS V. MARONEY, 399 U.S. 42 (1970); ENGLE V. ISAAC, U.S. 102 S.CT. 1558 (1982) AND UNITED STATES V. DECOSTER, 624 F.2d 196 (D.C. CIR. 1979), AND IS AN ERRONEOUS CONSTRUCTION OF 28 U.S.C. 2254 AND THE EXHAUSTION REQUIREMENT THEREUNDER.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CITATIONS	ii
PREFACE	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	13
ARGUMENT	15
CONCLUSION	20
APPENDIX	21

TABLE OF CITATIONS

UNITED STATES CASES	PAGE
Barksdale v. Blackburn, 670 F.2d 22 (5th Cir. 1982)...	15
Batten v. Scur, 649 F.2d 564 (8th Cir. 1981)..	15
Chambers v. Maroney, 399 U.S. 42 (1970).....	9, 16
Commonwealth v. Fox, 414 A.2d 642 (Pa. 1979).....	18
Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978).	19, 21
Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980)..	18
Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558 (1982).....	9
Grooms v. Wainwright, 610 F.2d 344 (5th Cir. 1980) cert. den. ___U.S.___, 100 S.Ct. 1605 (1980).....	15
Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980)..	18
Jones v. Wainwright, 604 F.2d 414 (5th Cir. 1979)..	18
Roberts v. Wainwright, 666 F.2d 517 (11th Cir. 1982).	1, 7

TABLE OF CITATIONS
CONTINUED

PAGE

Sweet v. Cupp,
640 F.2d 233 (9th Cir. 1981)... 15

Trantino v. Hatrack,
563 F.2d 86 (3d Cir. 1977),
cert. den. 435 U.S. 1928
(1977)..... 15

United States v. DeCoster,
624 F.2d 196 (D.C. Cir. 1979).. 13, 14,
19-20

United States v. Maguire,
600 F.2d 330 (1st Cir. 1979)... 18

United States v. Gray,
565 F.2d 881 (5th Cir. 1978)
cert. den. 435 U.S. 955 (1978). 18

Wainwright v. Sykes,
433 U.S. 72, 97 S.Ct. 2497, 53
L.Ed. 594 (1977)..... 9

Washington v. Strickland,
673 F.2d 879 (5th Cir. 1982)
en banc. reh. granted May
15, 1982..... 14, 20

OTHER AUTHORITIES

Knight v. State,
394 So.2d 997 (Fla. 1981)..... 9, 13,
14, 21

OTHER AUTHORITIES
CONTINUED

PAGE

Roberts v. State,
335 So.2d 285 (Fla. 1976).... 6

State v. Barton,
194 So.2d 241 (Fla. 1967).... 9

PREFACE

The Petitioner, Louie L. Wainwright was the Appellee in the Eleventh Circuit Court of Appeals and the Respondent in the United States District Court for the Southern District of Florida. The Respondent, Steven Henry Roberts, was the Appellant in the Circuit Court of Appeals and the habeas petitioner in the District Court. For clarity the parties will be referred to as the State and the Defendant.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the State's Appendix.

I.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is contained in the State's Appendix and is apparently unreported. The Opinion of the Eleventh Judicial Circuit Court of Appeals is reported at Roberts v. Wainwright, 666 F.2d 517 (11th Cir. 1982). There is no official reporter for citation to this opinion.

II.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendment VI of the United States Constitution.

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment VI of the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C 2254 provides inter alia that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of the United States.
>
> * * * * *
>
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indica, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing:

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate

hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a wnole concludes that such factual determination is not fairly supported by the record:

IV

STATEMENT OF THE CASE

The Defendant was originally convicted of rape pursuant to a grand jury indictment, which was subsequently reversed on appeal. See, Roberts v. State, 335 So.2d 285 (Fla. 1976). On remand the Defendant pleaded guilty to attempted rape and was sentenced to ten (10) years probation. A3.

On September 20, 1978 the Defendant was charged with violating the terms of his probation. A4. On July 18, 1979, the Defendant was located and subsequently extradited to Florida. The record reflects that at least on January 23, 1980 the Defendant had counsel and on January 28, 1980, discovery was invoked. A1. The Defendant's probation revocation hearing was March 13, 1980. A1;A4.

On his subsequent Petition for Habeas Corpus relief under 28 U.S.C. 2254 the Defendant's two claims were summarized by the United States District Court thus:

> "As grounds for relief, the Petitioner alleges the following:
>
> 1. That his conviction was obtained by a guilty plea which was not made with knowledge of the consequences of the plea.
>
> 2. Denial of the effective assistance of counsel as his attorney was not afforded time to familiarize himself with the facts and the law of his case."
>
> A3.

With regard to the present petition,[1] although the State did not raise any exhaustion issue the District Court found

---

[1] The Defendant's first claim was found to be without any factual predicate and the Defendant did not pursue the issue on appeal. Roberts v. Wainwright, 666 F.2d 517 (11th Cir. 1982).

that the Defendant had exhausted his claims:

> "Following the revocation of his probation and sentence, the Petitioner sought post conviction relief in the state trial court. He states that he raised the same grounds that he raises in the instant petition. That petition was denied in the state court on August 4, 1980. According to his federal petition, he then appealed from the state court order denying post-conviction relief. Apparently the appellate court affirmed the trial court's order denying relief. It appears that the Petitioner has complied with the exhaustion requirement of 28 U.S.C. §2254 (b) in presenting his claims to the state appellate court. Picard v. Connor, 404 U.S. 270 (1971); Lamberti v. Wainwright, 513 F.2d 277 (1975)."

A4.

With regard to the Defendant's latter claim the District Court rejected his claim for relief explaining that:

> "Petitioner's second claim for relief is that he was denied the effective assistance of counsel because

> his attorney was not allowed enough time to become familiar with the legal and factual issues of his case. Petitioner has not stated the manner in which he was prejudiced from this lack of time to prepare. This conclusory allegation of ineffectiveness of counsel without any affirmative demonstration of prejudice is insufficient to show ineffective assistance of counsel. See, United States v. Doran, 564 F.2d 1176 (5th Cir. 1977). Furthermore, the Fifth Circuit has determined that lack of time for preparation will not in itself support a claim of ineffective counsel. Cappetta v. Wainwright, 443 F.2d 1027 (5th Cir. 1970). Petitioner is therefore entitled to no relief as to this claim."
>
> A6-A7.

On appeal to the Eleventh Circuit Court of Appeals the Court reversed the District Court as to the Defendant's claim of ineffective assistance of counsel, reasoning on the basis that it was a pro se petition:

> "Liberally interpreted, we believe that the petition does set forth a claim for relief that warrants further judicial inquiry. Roberts contends that counsel was inadequately prepared to defend him. His charge, if confirmed by the totality of circumstances in the case, would be grounds for granting his petition."
>
> A11-A12.

Although neither party raised any issue on appeal as to exhaustion, the Circuit Court also reversed the District Court as to the exhaustion issue and furthermore in effect ordered that an evidentiary hearing should be conducted upon the present record which is the state court record:

> "If the court finds that Roberts has exhausted his state remedies, it should inquire into the merits of his claim of ineffective assistance. If no state record exists that is adequate for the federal district court to evaluate

> Roberts' claim, that court should hold its own evidentiary hearing."[Footnotes omitted].
>
> A12-A13.

The Circuit Court denied rehearing on March 16, 1982 but stayed its mandate pending review in this Court. A16-A18.

V

SUMMARY OF ARGUMENT

The Circuit Court has manifestly erred in reversing upon the issue of exhaustion of state remedies which was not litigated by anyone below. Exhaustion may be waived and was waived.

The Circuit Courts opinion cuts down the correct standard for the burden of proof upon claims of ineffective counsel in a habeas corpus proceeding. See, United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979); Knight v. State, 394 So.2d 997 (Fla. 1981). Under DeCoster and Knight the specific omission upon the claim of ineffective counsel must be specifically detailed in the defendant's pleading. The burden of showing that the omission prejudiced the defendant is solely upon the defendant. Accordingly, the requirement

of a specific pleading is great. The Court's ruling derogates the requirement under Knight and DeCoster, and is not a sound or correct analysis of the burden of proof and pleading in proceeding under 28 U.S.C. 2254. See, also, Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982), en banc rehearing granted, May 14, 1982.

V

ARGUMENT

The Circuit Court of Appeals has manifestly erred in reversing upon the issue of exhaustion where no party litigated the issue below. The issue of exhaustion may be waived, Barksdale v. Blackburn, 670 F.2d 22 (5th Cir. 1982); Grooms v. Wainwright, 610 F.2d 344 (5th Cir. 1980), cert.den.,___U.S.___, 100 S. Ct. 1605 (1980); Batten v. Scur, 649 F. 2d 564 (8th Cir. 1981), contra, Sweet v. Cupp, 640 F.2d 233 (9th Cir. 1981); Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977), cert. den. 435 U.S. 1928 (1977), and the State waived any issue of exhaustion in the present case. This issue has vast importance to the ongoing litigation in the death penalty cases, where the delay in effecting state judgments is causing vase public dissatisfaction and

creating great antagonism and the breakdown of comity between federal and state courts.

The Defendant claimed at "ground two" that he was denied ineffective counsel because counsel was not afforded enough time to familiarize himself with the facts and law of the case. The present Circuit Court opinion in effect requires an evidentiary hearing upon such a bare allegation. To the contrary, summary allegations that counsel did not speak with the Defendant do not make a valid claim of error. See, Chambers v. Maroney, 399 U.S. 42 (1970). In Chambers v. Maroney, the Court rejected without a hearing the defendant's claim that counsel was ineffective because he was only appointed on the day of trial, where the record showed that the defendant had been appointed an attorney earlier than the

first day of trial. 399 U.S. at 53-54. A summary allegation that more time was needed for preparation for trial is insufficient to establish an allegation of prejudice. See, United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978), cert. den. 435 U.S. 955 (1978)(time spent in preparation in and of itself is not a showing of ineffective counsel). Counsel need only consult with his client as often as necessary to provide reasonably competent assistance, considering the nature of the particular case. A short time and even one meeting may suffice to satisfy the constitutional requirement. Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980); Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980); Jones v. Wainwright, 604 F.2d 414 (5th Cir. 1979); United States v. Maguire, 600 F.2d 330 (1st Cir. 1979); Commonwealth v. Fox, 414 A.2d 642 (Pa. 1979)(life

sentence for first degree murder).

Further, in the present case, the present case, the record clearly reflects that the Defendant had counsel and discovery was invoked almost sixty (60) days prior to trial. Under federal and state law the Defendant's bare claims may be summarily rejected without a hearing if they are conclusively refuted by the records. See, Chambers v. Maroney, 399 U.S. 42 at 53-54; Knight v. State, 394 So.2d 997 (Fla. 1981). Summary allegations without factual support are properly denied without a hearing. See, Wainwright v. Sykes, 433 U.S. 72 at 91-92, 97 S.Ct. 2497 at 2508-2509, 53 L.Ed. 594 (1977); State v. Barton, 194 So.2d 241 (Fla. 1967). In Engle v. Isaac, ___U.S.___, 102 S.Ct. 1558, at 1576 (1982) Justice Stevens in concurring noted that:

> "A petition for a writ of habeas corpus should be dismissed if it merely attaches a constitutional label to factual allegations that do not describe a violation of any constitutional right. In Part IIA of its opinion, the Court seems to agree with this proposition. See ante, at 1567-1568."

See, also, Cooper v. Fitzharris, 586 F.2d 1325, at 1329 (9th Cir. 1978)(en banc: "The concern that courts would be overburdened with frivolous accusations of incompetent assistance was met by requiring specificity in pleading the inadequacies of counsel's performance and how they prejudiced the accused"). The present cause is no less than an absolute retreat from Justice Stevens observation in Engle v. Isaac, and the fundamental analysis noted in Cooper v. Fitzharris.

The reasoning of the present panel is based upon the analysis in United States

DeCoster, 487 F.2d 1196 (D.C. Cir. 1973) (Baselon, J.)(DeCoster I) and United States v. DeCoster, 624 F.2d 300 (D.C. Cir. 1976) (Bazelon, J.)(DeCoster II). In DeCoster I and II the court relying upon a "check-list" of errors held that these would be ineffective counsel if they were "substantial." The meaning of "substantial" was left ambiguous, but clearly was not related to any effect upon the outcome of the cause. See, 624 F.2d at 215. Recently, in Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982), rehearing en banc granted, May 14, 1982, the court followed the same reasoning as in DeCoster I and II. DeCoster I and II were however overruled in United States v. DeCoster, 196 F.2d 624 (D.C. Cir. 1979)(en banc), cert. den.,___U.S.___, 100 S.Ct. 302 (1980)(hereinafter DeCoster). In the Florida state courts the rule applied herein derives from the landmark decision

in Knight v. State, 394 So.2d 997 (Fla. 1981). In Knight, the Court, relying upon DeCoster, set a four step standard of analysis including the requirement noted above by Justice Stevens and reasoned in Cooper v. Fitzharris, that a Defendant must specifically allege error and prejudice. The present panel opinion abrogates Knight and creates a constitutional crisis between the highest federal court in Florida and the highest state Court in Florida.

WHEREFORE, the Petitioner, LOUIE L. WAINWRIGHT, submits that this Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General